TIU SHI KIAN & ANOR.

v.

RED ROSE RESTAURANT SDN. BHD.

HIGH COURT BORNEO, KOTA KINABALU
WAN MOHAMED J
[CIVIL SUIT NO. K. 419 OF 1982]
22 AUGUST 1983

CIVIL PROCEDURE: *Contempt of Court - 'Erinsford Property' - Type of injunction granted - Whether respondents committed breach of order.*

The applicants were granted an "Erinsford Property" type of injunction by this Court on 14 March 1983. The respondents were served with the order on the same day. The applicants were able to resume business at the demised premises for 2 nights without interference. However, on 16 March 1983, the applicants were locked out of the demised premises by the respondents. The respondents further caused advertisements to be published in local newspapers informing the public that Hotel Berjaya was now the owner of the demised premises and that the demised premises has been closed for renovation. The appellants appealed to this Court as the respondents have breached the Court order.

Held:

[1] The law involved in civil contempt of Court requires the following ingredients to be satisfied before a person could be found guilty of it:

(i) terms of the injunction must be clear and unambiguous;

(ii) respondents must have proper notice of such terms;

(iii) onus of proof that the terms of the order have been broken and breached must be proved beyond all reasonable doubt; and

(iv) *mens rea* need not be proved.

[2] The Court has found the above four ingredients have be proven beyond all reasonable doubt against the respondents.

Cases referred to:

Liberian Trust Ltd. v. Founders Trust and Investment [1932] All ER 176
T.O. Thomas v. Asia Fishing Industry (Pte.) Ltd. [1977] 1 MLJ 151
Scottish Co-op Wholesale Society Ltd. v. Meyer [1958] 3 All ER 66
Hotel Jaya Puri Bhd. v. NVH Bar & Restaurant [1980] 1 MLJ 109
R. v. Odhams Press Ltd. [1956] 3 All ER 496

For the plaintiffs - Joseph Tang (G. Math with him); M/s. Shelley Yap Leong Tseu Chong Chia & Co.
For the defendants - C. I. Robertson; M/s. Skinner Lind Robertson Pang Willie & Co
For the respondents - Lim Kean Chye (Joseph Lee with him); M/s. Joseph Lee & Co

JUDGMENT

Wan Mohamed J:

This is an appeal against my decision where I find the three respondents, namely, (1) Albert Teo, (2) Datuk Hong Kim Sui and (3) David U Kwok Fai guilty of committing a Court contempt by openly defying a Court order dated 14 March 1983. This is a civil Court contempt proceeding brought about by the plaintiff applicants, namely, (1) Tiu Shi Kian, (2) Chan Jin Hong.

Briefly, the facts are as follows. On 24 November 1982, the applicants made an *ex parte* application praying for an order that Red Rose Restaurant by their servants or agents or otherwise be restrained from:-

(a) disturbing the applicant's quiet use and enjoyment of the Hotel Shangrila Night-club and Restaurant and the equipment, furniture and fixtures therein;

(b) removing the equipment, furniture and fixtures, therein.

This application was heard on the same day and I granted only an interim injunction to cover for the period from 24 November 1982, until the return date. I fixed the return date on 10 December 1982, for the purpose of hearing arguments from both sides. In short, this interim injunction was granted solely to maintain the *status quo* of the parties pending argument and hearing of both parties. On 10 December 1982, the hearing was adjourned to 16 December 1982, for further arguments in open Court.

On 3 March 1983, the decision was delivered where I dismissed the plaintiffs' application because from the material available they have failed to disclose that the applicants have any real prospect of succeeding in their claim for a permanent injunction at the trial. Immediately on the same day, a Notice of Appeal was filed. However, no *"Erinsford Property"* type of injunction was made on the same day due to the fact that the solicitors for the defendants, i.e. Red Rose Restaurant, had allowed the applicants by a letter dated 3 March 1983, to continue to operate the demised premises as a night-club provided the applicants undertake to have the appeal fixed within two months. M/s. Shelley Yap Leong Tseu Chong Chia & Co., as Counsel for the applicants, agreed and they managed to have the appeal fixed in May 1983 when the Federal Court sits in Kota Kinabalu. However, two days later, i.e. on 6 March 1983, the demised premises was closed. As a result, on 8 March 1983, due to this closure of the premises, the applicants made a second application for an *"Erinsford Property"* type of injunction. This second application was heard on 14 March 1983, where I granted the application based on the principle as enunciated in the *"Erinsford Property"* case. (Citation - [1974] 2 All ER 448). This order dated 14 March 1983, was immediately served on Red Rose Restaurant on the same day.

On the nights of 14 & 15 March 1983, the applicants were not prevented to enter into the demised premises to resume their night-club business. However, on 16 March 1983, the applicants could not continue their business for the simple reason that the demised premises was locked. Secondly, there were also advertisements appearing in local newspapers informing the public that Hotel Berjaya, as owner of the licensed premises, had closed the Golden Million Nite-Club and Red Rose Restaurant for renovation purposes.

Clearly, on the face of it, the order dated 14 March 1983, had been breached. The person or persons responsible for the closure of the premises must therefore be guilty for contempt of Court.

The law involved in civil contempt of Court requires the following ingredients to be satisfied before a person could be found guilty of it:

(1) The terms of the injunction must be clear and unambiguous. The relevant part of the order dated 14 March 1983, is as follows;

> It is ordered that the defendant (i.e. Red Rose Restaurant) their servants or agents be restrained from disturbing the plaintiffs' quiet use and enjoyment of the Hotel Shangrila Night-club and Restaurant and the equipment, furniture and fixtures therein; AND it is further ordered that the defendants, their servants or agents be restrained from removing the equipment, furniture and fixtures therein.

The respondents are charged that:

(a) since 16 March 1983, locked and prevented and still are locking and preventing the applicants from entering into the Golden Million Cabaret & Night-club at Hotel Shangrila;

(b) on 16 March 1983, closed and still are closing the business of the Golden Million Cabaret & Night-club;

(c) on 16 March 1983, publishing or causing to be published in the various issues of the local papers a notice to the effect that "Hotel Berjaya Sdn. Bhd., as owner of the hotel premises, had closed Red Rose Restaurant Sdn. Bhd. and Golden Million Cabaret & Night-club or words to the effect;

(d) as directors of Hotel Berjaya Sdn. Bhd. ("Hotel Berjaya") aided and abetted and still are abetting and aiding the Red Rose Restaurant in disobeying the order of the Court since 16 March 1983.

(e) as directors of Red Rose Restaurant Sdn. Bhd.-

(i) acted and are still acting since 16 March 1983, in collusion with the Hotel Berjaya Sdn. Bhd. in committing the breach of injunction of 14 March 1983.

(ii) since 16th March, 1983, allowed, aided and abetted and still are allowing, aiding or abetting the Hotel Berjaya Sdn. Bhd. in committing the breach of injunction of 14th March, 1983.

The issue now is to consider whether the order dated 14 March 1983, is so clear and unambiguous that the above charges could be proved. In my view, I am satisfied that the order is not ambiguous and the contents of the charges had been duly proved by evidence as adduced by the respondents themselves during the cross-examination of their affidavits filed in Court.

The learned Counsel for the respondents had submitted in great length that the order is not clear at all and could be subject to two interpretation. The gist of the argument lies in the fact that the order is for the preservation of a *status quo* that had already been destroyed or non-existing. To allow the applicants quiet use and enjoyment of the demised premises is impossible as the demised premises had already been closed since the Court dismissed the applicants' first application dated 24 November 1982, on 3 March 1983.

In reply to this contention, the Counsel for the applicants submitted that there is a *status quo* to be maintained. It is important to relate this point to the history of this case. The nature of the tenancy agreement made between the defendants and the applicants for the purpose of operating a night-club only requires the demised premises to be open from 8.00 p.m. till the night-club closed its business next morning usually at about 2.00 a.m. So each day the respondents or their workers would leave the main entrance of the licensed premises open and let the applicants and their workers enter and would lock the licensed premises each day after the night-club business hours. The injunction dated the 24 November 1982, was in essence to restrain the respondents from locking the licensed premises from 8.00 p.m. each night until the business hour of the night-club is over. The *status quo* the applicants sought to preserve were a continuance of the night-club business and the employment of their workers which at any point of time was about one hundred.

The licensed premises though was under renovation after 6 March 1983, was still capable of being used as a night-club though there might be some inconvenience. The order dated 14 March 1983, is similar to the earlier order where the respondents were restrained from locking up the premises. The *status quo* is to preserve the fixtures, furniture and musical instruments in the licensed premises and also the business of the applicants.

I reject the argument of the respondents that there was no *status quo* to be preserved due to the fact that the demised premises was closed and renovation work had started prior to the order of injunction dated 14 March 1983, was made. *Status quo* in actual fact existed on 14 and 15 March when applicants could still operate the night-club business. Mr. David U, the Manager of Shangrila Hotel, in his evidence admitted that applicants had in actual fact operated the night-club on the nights of 14 and 15 March 1983. He and Albert Teo did not try to stop the applicants to carry on the night-club business on those two nights. The order of the Court dated 14 March 1983, was unambiguous and clear. It could basically be obeyed by the respondents by just allowing the applicants to operate the business of the night-club as on 14 and 15 March 1983. Cases relied on this point are *Liberian Trust Ltd. v. Founders Trust and Investment* [1932] All ER 176; *T.O. Thomas v. Asia Fishing Industry (Pte) Ltd.* [1977] 1 MLJ 151.

The second ingredient is that the respondents must have proper notice of such terms. From the affidavits of service, I am satisfied that the respondent, Albert Teo, was served as a director of Red Rose Restaurant on 15 and 17 March 1983 and the respondent, Datuk Hong, was served as a director of Red Rose Restaurant on 24 March 1983, after his return from Taiwan. The affidavits of Albert Teo affirmed on 3 March 1983, marked as "RA1" at para. 7 admitted that he was informed by the defendants' solicitors about the order on the same day on 14 March 1983. Datuk Hong in his evidence also stated that after he received a copy of the order he went to see his solicitors. As such, I am also satisfied that the second ingredient has also been satisfied.

The third ingredient is that there must be clear proof that the terms have been broken and breach must be proved beyond all reasonable doubt.

> A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt." - per Lord Denning in *Re Bram-blevile Ltd.* [1969] 3 All ER 1062 at p. 1063.

The first respondent, Albert Teo, in his evidence and affidavit ("RA1") in paras. 3, 9, and 11, stated that it was the owner of Hotel Shangrila, i.e. Hotel Berjaya, who prevented the plaintiffs from operating their night-club business on the licensed premises on 6 March 1983. He also stated in para. 14 that the defendants, Red Rose Restaurant, were no more in possession of the licensed premises on 16 March 1983. As such, the respondents should be exonerated from all liabilities. Upon cross-examination in connection with "RA1", Albert Teo referred to a telephone conversation between him and Datuk Hong on 5 March 1983, while the latter was still in Taiwan. He said he was instructed by the latter to close the licensed premises but Albert Teo refused to act accordingly. Datuk Hong then spoke to David U, the Manager of the Hotel Shangrila, to close the licensed premises as from 5 March 1983. David U then closed the premises on 6 March 1983. However, this is only a breach of the undertaking between the parties. It is not in breach of a Court order.

The Counsel for the applicants submitted that Red Rose Restaurant was in fact never dispossessed of the licensed premises although some renovation had been carried out. If the Red Rose Restaurant had been dispossessed of it, there is no reason as to why the defendants should spend about RM300,000 million on the renovation.

Albert Teo in his affidavit affirmed on 11 March, 1983, admitted that the defendants had carried out the renovation although this was disputed by Datuk Hong who in his evidence when cross-examined by Counsel for the applicants said, "I did not know if it was carried out by Red Rose Restaurant" when he was asked, "Do you agree with Albert Teo who said that Red Rose Restaurant Sdn. Bhd. was the one which caused the renovation to be done?" He answered, "I don't know that but it should be Hotel Berjaya Sdn. Bhd." From his reply I find that Datuk Hong was not sure whether the renovation of the licensed premises was not caused to be done by Red Rose Restaurant. It is observed from his demeanour that Datuk Hong was not telling the truth and that he was evasive in giving replies to even very straightforward and simple questions put to him by the Counsel for the applicants.

When the order of injunction dated 14 March 1983, was on the same day served on Albert Teo, the applicants, i.e. Golden Million Cabaret & Night-club, were not restrained from operating the night-club business for the following two nights, although not under very comfortable conditions. This clearly indicates that the night-club business could still continue until the appeal is heard. The respondents in this case had not allowed this state of affairs to continue. On 16 March 1983, the respondents, Albert Teo and David U, had with malice shown an animosity against the applicants and daringly took steps in defying the Court order when they locked up the demised premises and thereby prevented the applicants from operating the night-club business. They also caused the advertisement to be published. I would repeat that had they continued to allow the applicants to continue operating the night-club business until the appeal was heard in May 1983, then there would have been no contempt of Court.

The respondents had attempted to mask themselves by making use of Hotel Berjaya Sdn. Bhd. to say that the Red Rose Restaurant was dispossessed of the licensed premises and thereby pleaded that the defendants (Red Rose Restaurant) were helpless and had nothing to do with the licensed premises at the material time. Having explained and understood that the two corporate bodies are in fact one single authority, I find it is just like the right hand telling the left hand to commit an act with the hope that the right hand will not be blamed for it. This sort of device should not be allowed to defeat justice. I therefore find that the mask is not only transparent but porous.

It is noted that all the three respondents had consulted their respective solicitors when the order of the injunction was served on them before taking any step which led to the closure of the licensed premises. However, it is not clear to the Court as to whether the locking of the licensed premises and the taking of steps in advertising the closure of the night-club were the direct consequence of the advice given by the solicitors. If it is proved that the respondents had acted in the manner stated above in accordance with the advice given to them by the solicitors concerned, the Court shall not hesitate to rope in such solicitors for abetting the breach of the Court order as in the case of *T.O. Thomas v. Asia Finishing* [1977] 1 MLJ 151.

I find it as of fact that Hotel Berjaya Sdn. Bhd. and Red Rose Restaurant are actually a "two-in-one" and "one-in-two" entity. The real issue to be decided is whether this Court will lift the corporate veil of these two statute-created entities. The principle enunciated in the *Scottish Co-op Wholesale Society Ltd. v. Meyer* [1958] 3 All ER 66 held that the Court will look at the **business realities** of a situation and does not confine them to a narrow legalistic view in lifting the corporate veil. In *Hotel Jaya Puri Bhd. v. NVH Bar & Restaurant* [1980] 1 MLJ 109 at p. 112 the Court held that:

(1) the hotel and the restaurant were interdependent;

(2) there was a functional integrality and unity of establishment between the hotel and the restaurant. In other words, functionally the hotel and the restaurant are in fact one integral whole and management-wise they also constitute a single unit ...

In my view, by adopting the tests as laid down in the Scottish case where the Court must look at the business realities of a situation plus the functional integrality approach as enunciated in the *Hotel Raya Puri case*, I am satisfied that Red Rose Restaurant and Hotel Berjaya are actually in this particular case "one single entity". Management-wise there is also unity as the directors of Hotel Berjaya are also directors of Red Rose Restaurant.

The last ingredient in Civil Court contempt proceeding is the proof of *mens rea*. This had been settled in the case of *R. v. Odhams Press Ltd.* [1956] 3 All ER 496 where no *mens rea* need to be proved.

ALBERT TEO CHIN KION

The Court has to be satisfied beyond reasonable doubt that Albert Teo is responsible for violating the injunction order dated 14 March 1983, before holding him guilty for contempt of Court. From the affidavits sworn by him and the applicants' affidavits filed in Court and after considering his oral evidence given at the hearing of this matter, I am satisfied that the above requirement had been fulfilled. He had only tried to impress upon the Court that he was helpless and was unable to comply with the order of the Court. But it is found as of fact that the Red Rose Restaurant was never dispossessed and that it was within his power to comply with the order of Court. Therefore, Albert Teo failed in trying to exonerate himself. Secondly, the publication of the advertisement on 16 March 1983, was done with the full knowledge and consent of Albert Teo as testified by David U, the general manager of Shangrila Hotel.

In conclusion, I find him guilty for contempt of Court and I fine him a sum of RM10,000; in default five months imprisonment, and fine to be paid within three days.

DATUK HONG KIM SUI

He came back to Kota Kinabalu from Taiwan on 23 March 1983. After his return, he was immediately served with the Court order dated 14 March 1983. It is immaterial in my view whether he has knowledge of the order when he was in Taiwan. He claimed that he was not consulted nor informed on any developments or about the renovation or the closure of the licensed premises from 6 to 23 March 1983. He was served with the order of injunction on 24 March 1983. On that day he knew that the licensed premises was locked and the applicants were deprived from operating the night-club. He also knew that the closure was advertised in the local newspapers and he took no step to comply with the order of Court dated 14 March 1983, and in fact allowed the breach to be continued until the date of hearing of this matter. Datuk Hong being the Managing Director of the defendant company (Red Rose Restaurant) and Hotel Berjaya Sdn. Bhd. which caused the breach of the Court order, himself admitted that he could have complied with the order of Court. He had done nothing to comply with the order of the Court but instead allowed the breach to be continued. It is therefore clear that he is guilty for contempt of Court. I fine him a sum of RM6,000; in default three months imprisonment. The fine to be paid within three days.

DAVID U KWOK FAI (General Manager of Hotel Berjaya)

The Court on its own motion and pursuant to O. 52, r. 5 of the Rules of the High Court 1980 issued a Notice of Motion dated 24 June 1983, against David U to show cause as to why he should not be committed for his several contempts of this Court upon the following grounds:

(a) According to his testimony at the hearing for committal of Datuk Hong and Albert Teo on 5 May 1983, he admitted he was the one who closed the Golden Million Cabaret & Night-club as from 16 March 1983.

(b) He admitted in the same hearing that he on 16 March 1983, caused to be published in the various issues of the local papers a notice to the effect that Hotel Berjaya Sdn. Bhd., as owner of the hotel premises, had closed Red Rose Restaurant Sdn. Bhd. and Golden Million Cabaret & Night-club;

(c) He admitted when such advertisement was made he had knowledge of the order of the Court dated 14 March 1983.

The above acts amount to contempt of Court. David U had deprived the plaintiffs from operating the Golden Million Cabaret & Night-club which amounts to disturbing the plaintiffs' quiet use and enjoyment of the licensed premises.

The Counsel for the respondents had submitted that there is no evidence to show beyond reasonable doubt that David U closed the premises on 16 March 1983. In reply to this, I refer to my Notes of Proceedings, p. 16-B, where David U himself expressly stated in the cross-examination, "I was the one who caused the night-club to be closed as from 16 March 1983 ...."

Learned Counsel for David U also submitted that there was no *status quo* to be preserved at the time the order dated 14 March 1983, was given due to the fact that the licensed premises were already closed since 4 March 1983. I have already dealt in detail earlier and gave my reason why I cannot accept the above contention. There was in fact *status quo* to be preserved which David U intentionally violated.

In p. 16-D of my Notes of Proceedings, David U had himself admitted by saying, "I was the one who caused the notice as in para. 18 of Chan Jin Hong's affidavit ("RA1") to be inserted in the newspapers." Above all, David U admitted that he knew of the contents of the Court order dated 14 March 1983. Another defence raised was that David U merely acted on the instructions of his directors. David U cannot exonerate himself from being liable for contempt of Court just because he is acting on an instruction of a director or directors when he fully knew that there was an order of the Court which forbade anyone from disturbing the quiet use and enjoyment of the licensed premises by the plaintiffs.

As such, I am satisfied that David U had failed to show cause as to why he should not be guilty of the charges made against him. I find him guilty of committing a Civil Court contempt. I fine him RM6,000; in default three months' imprisonment. Fine to be paid within three days from today.

Also found at [1984] 1 CLJ 325